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No. 86-539

In The

Supreme Court of the United States

October Term, 1986

SAMUEL P. TORRENCE, JR.,

Petitioner,

vs.

OXFORD MUNICIPAL SCHOOL DISTRICT, AND ITS BOARD OF TRUSTEES, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, GENE MEADOWS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND TERRY MOOD, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari.

CASE HISTORY

In the present action petitioner has alleged that respondents, the Oxford [Mississippi] Municipal School District, its former superintendent, and a former high

school principal, unlawfully terminated the petitioner from employment because of his race and in retaliation for a prior charge of discrimination filed with the Equal Employment Opportunity Commission. Federal jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343(4) for causes of action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3), and 42 U.S.C. §§ 1981 and 1983. After discovery and a pretrial conference, the District Court conducted a full two-day evidentiary hearing. After its conclusion, the District Court found, as fact, that the non-renewal of the petitioner's teaching contract was not racially motivated but, instead, was based upon unsatisfactory work performance. The District Court further noted that "the reasons proffered by the school board . . . are supported by substantial evidence." Appendix B-19. Since no evidence or testimony was presented regarding the issue, the District Court found no basis for petitioner's claim of retaliation and concluded that the claim had been abandoned. Appendix B-19, 20; *see also* B-25. These findings of fact necessitated a ruling that, while petitioner had presented a prima facie case of disparate treatment under Title VII, respondents had articulated legitimate, non-discriminatory reasons for its employment decision and that the petitioner did not demonstrate that those reasons were a mere pretext to racial discrimination. Appendix B-25. The two parallel causes of action for racial discrimination were likewise dismissed. The United States Court of Appeals for the Fifth Circuit, in an unpublished *per curiam* opinion, affirmed the District Court decision. Appendix C.

To the extent petitioner has characterized facts unsupported by the current record, respondents would object. The facts relevant and essential to petitioner's appeal are adequately set forth in the two lower court opinions.

CERTIORARI SHOULD NOT BE GRANTED

Respondents have procedural and substantive arguments against granting certiorari.

Petitioner presents the following question for the Court's review:

> When a plaintiff in a civil rights case presents a prima facie case of discriminatory termination based upon disparate treatment in comparison with his non-minority predecessor, to the extent that the employer imposes a different and more stringent standard of job performance upon the plaintiff than was imposed upon his white predecessor, how heavy should be the burden of proof required of the defendant to rebut the prima facie case and should that burden be a greater one than in the ordinary case?

This question differs greatly from the issue[s] which petitioner raised and were considered by the Fifth Circuit Court of Appeals. Those issues, as outlined in petitioner's initial appellant brief, are as follows:

1. Whether the District Court erred in finding that the appellant, Samuel P. Torrence, Jr., was discharged from his employment with the Oxford Municipal School District because of his race. This issue encompasses three subissues [sic]:

    a. Whether the school administration deliberately engaged in a long term plan to put Mr. Torrence into a position where he could not possibly measure up to the standard required of him by the administration;

    b. Whether Mr. Torrence was treated differently from other band directors and employees

who achieved similar results, but were allowed to retain their employment;

c. Whether the school administration adequately supported Mr. Torrence after it voted to retain him based upon the recommendations of a hearing officer in 1980 which recommendations included such items as an assistant band director, new uniforms, etc.

Appendix D-2.

Since the issue presented for certiorari differs from those presented to the courts below, the District Court and the Fifth Circuit Court of Appeals have never addressed the issue petitioner currently advocates. Indeed, the Fifth Circuit viewed the questions petitioner raised at that level of appeal as follows: "[Petitioner's] principal complaint on appeal is that the district court clearly erred in finding that [respondents'] proffered reasons for his dismissal were not pretextual." Appendix C-8. Since petitioner failed to raise his present theory to the Circuit Court, certiorari should be denied on this basis alone.

Firmly established is the principle that this Court will not entertain questions by writ of certiorari not previously raised and considered by the reviewing Court of Appeals or a state's highest court. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 1602, 26 L.Ed. 2d 142 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Youakim v. Miller*, 425 U.S. 231, 233-234, 96 S.Ct. 1399, 1401, 47 L.Ed. 2d 701 (1976) (citing cases); *Lawn v. United States*, 355 U.S. 339, 362, n. 16, 78 S.Ct. 311, 324, 2 L.Ed. 2d 321 (1958);

Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927) (citing cases); *Montana Ry. Company v. Warren,* 137 U.S. 348, 351, 11 S.Ct. 96, 97, 34 L.Ed. 681 (1890); *Husty v. United States,* 282 U.S. 694, 701-02, 51 S.Ct. 240, 241, 75 L.Ed. 629 (1931); *Schlesinger v. Councilmen,* 420 U.S. 738, 743, 95 S.Ct. 1300, 1306, 43 L.Ed. 591 (1975); *Old Jordan Mining and Mill Company v. Societe Anonyme Des Mines De Lexington,* 164 U.S. 261, 17 S.Ct. 113, 114, 41 L.Ed. 427 (1896); *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed. 2d 398 (1969) (appeal from state court); *Tacon v. Arizona,* 410 U.S. 351, 352, 93 S.Ct. 998, 999, 35 L.Ed. 2d 346 (1973) (same). Only in exceptional cases arising from the federal courts will questions not pressed or passed upon below merit review. *Duignan v. United States,* 274 U.S., at 200, 47 S.Ct., at 568; *Lawn v. United States,* 355 U.S., at 362, n. 16, 78 S.Ct., at 324. As the Court stated in *Magruder v. Drury,* 235 U.S. 106, 35 S.Ct. 77, 79, 59 L.Ed. 151 (1914), alleged errors not of a fundamental or jurisdictional character and not presented to the appellate court for consideration are deemed waived either expressly or by implication.

The question petitioner seeks to be reviewed does not involve elements fundamental or jurisdictional in nature; nor is petitioner's question of such an exceptional nature as to warrant this Court's review. *Cf. Youakim v. Miller,* 425 U.S., at 234, 96 S.Ct., at 1401 (conflict between state and federal statutes). Had petitioner raised the issue below, specific findings consistent with the theory petitioner now advocates could have been obtained; and, depending on the outcome, this costly added litigation might have been avoided.

When searching for that "exceptional" case which, under these extraordinary circumstances, merits review,

the Court may use by comparison its own guidelines for deciding when to grant certiorari in the typical case. "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rule 17, Revised Rules of the Supreme Court of the United States. The decision of the Court of Appeals does not:

(1) conflict with a decision of another court of appeals,

(2) conflict with a decision of this Court,

(3) depart from the accepted and usual course of judicial proceedings, or

(4) present an important question of federal law.

To the contrary, as noted below, the decision of the Court of Appeals is consistent with other courts of appeals, consistent with the prior decisions of this Court, and consistent with the usual course of judicial procedure. The underlying question petitioner has presented for review has been recently addressed, and re-affirmed, by this Court. Accordingly, even had petitioner's question been raised below, it would not warrant review.

Petitioner seeks to undermine the well-established evidentiary scheme used when addressing Title VII actions. Petitioner admits in his initial brief to the Fifth Circuit Court of Appeals that the law is "well established" in this area, Appendix D-3, and, in fact, relies on this procedure when arguing before that court. The procedure established by *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), and the cases that follow, requires a plaintiff to carry the

initial burden of production and establish a prima facie case of racial discrimination. No single method exists by which a prima facie case must be presented. A prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed. 2d 957 (1978) (defining the elements of a prima facie case). Once accomplished, the employer must produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed. 2d 207 (1981). At this point, the presumption of discrimination "drops from the case," *id.* at 255, n. 10, 101 S.Ct. at 1095, and the District Court proceeds to the ultimate question: whether the particular employment decision at issue was made based on impermissible grounds, such as race. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 1481-82, 75 L.Ed. 2d 403 (1983). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S., at 253, 101 S.Ct., at 1093; *see also Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 25, n. 2, 99 S.Ct. 295, 296, 58 L.Ed. 2d 216 (1978); *United States Postal Service Board of Governors v. Aikens,* 460 U.S., at 716, 103 S.Ct., at 1482.

Along with the cases previously cited, this Court has consistently followed the principles outlined above. See

also, *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed. 2d 718 (1984); *McDonald v. Santa Fe Trail Transportation Company,* 427 U.S. 273, 281, 96 S.Ct. 2574, 2579, 49 L.Ed. 2d 493 (1976); *General Electric Company v. Gilbert,* 429 U.S. 125, 137, 97 S.Ct. 401, 408, 50 L.Ed. 2d 343 (1976); *N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393, 400, n. 5, 103 S.Ct. 2469, 2473, 76 L.Ed. 2d 667 (1983). The decision of the Court of Appeals is, therefore, not inconsistent with the decisions of this Court. Since the *Burdine* decision, each circuit court of appeals has specifically adopted this evidentiary scheme with marked consistency. See, e.g., *Mitchell v. Baldrige,* 759 F.2d 80, 84-85 (D.C. Cir., 1985); *Andrews v. Bechtel Power Corporation,* 780 F.2d 124, 141 (1st Cir. 1985); *Meiri v. Dacon,* 759 F.2d 989, 995 (2nd Cir. 1985); *Monroe v. Burlington Industries, Inc.,* 784 F.2d 568, 571 (4th Cir. 1986); *McDaniel v. Temple Independent School District,* 770 F.2d 1340, 1345 (5th Cir. 1985); *Selden Apartments v. U. S. Department of Housing and Urban Development,* 785 F.2d 152, 160-161 (6th Cir. 1986); *Dorsch v. L. B. Foster Company,* 782 F.2d 1421, 1424 (7th Cir. 1986); *Weber v. Block,* 784 F.2d 313, 315 (8th Cir. 1986); *Lowe v. City of Monrovia,* 775 F.2d 998, 1005 (9th Cir. 1985); *E.E.O.C. v. University of Oklahoma,* 774 F.2d 999, 1001 (10th Cir. 1985); *Barber v. International Brotherhood of Boilermakers,* 778 F.2d 750, 756 (11th Cir. 1985); *Stokes v. F.A.A.,* 761 F.2d 682, 684 (Fed. Cir. 1985). Accordingly, the Appeals Court decision is not inconsistent with that of another circuit. An examination of the decisions rendered by both the District Court, Appendix B, and Fifth Circuit Court of Ap-

peals, Appendix C, would reveal no departure from accepted and usual course of proceedings, but, rather, close adherence to the above cited criteria.

Substantively, petitioner has misconstrued this basic framework of the *McDonnell Douglas* divisions of intermediate evidentiary burdens and their purpose. He complains that, since he is unable to compare the treatment he received with that of a present employed non-minority counterpart and was allegedly held to higher standards of performance than non-minority personnel previously assigned the same position, respondents "should be assigned a heavier burden of proof necessary to overcome the presumption under *McDonnell Douglas.*" Petition, pp. 12-13; 27-29. Petitioner suggests that the burden be one of "clear and convincing evidence." Petition, p. 29. This argument may vaguely follow either one of two avenues of reasoning. First, petitioner may argue that while the ultimate burden of persuasion remains with him, once a prima facie case is established, an employer must present the reasons for the employment decision by "clear and convincing evidence." Secondly, petitioner's argument may be construed to the effect that, once a prima facie case is established, an employer now carries the ultimate burden of persuasion and must overcome this burden using "clear and convincing evidence." Either argument is conceptually flawed and inopposite with the Court's latest pronouncements; the language and rationale of *Texas Dept. of Community Affairs v. Burdine, supra,* resolves each.

The *Burdine* Court reviewed the following question: "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of

evidence that legitimate, non-discriminatory reasons for the challenged employment action exist." *Id.*, at 250, 101 S.Ct., at 1092. This question, bearing the same characteristics as that asserted by petitioner, was answered in the negative. The Court specifically rejected such an evidentiary criteria and, when doing so, re-affirmed what it had already thought clear. In describing the nature of the burden placed on a defendant-employer, the Court stated:

> The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See *Sweeney, supra*, at 25, 99 S.Ct., at 296. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. . . . Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Burdine, 450 U.S., at 255-56, 101 S.Ct., at 1094-95.

Addressing what respondents perceive to be the first avenue petitioner's argument may take, *Burdine* rejects the need for a "clear and convincing" standard. The primary purpose of placing the burden of production upon

an employer is to help define disputed factual issues. "[T]he allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*, at 255, n. 8, 101 S.Ct., at 1094-95. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Id.*, at 255, 101 S.Ct., at 1095. An employer's burden of production focuses the attention of the trier of fact on those specific instances that allegedly prompted the adverse employment decision. This requirement seems only natural, for without it, a plaintiff would be required to address in his or her case in chief each and every aspect of employment in an attempt to rule out any possible legitimate, non-discriminatory reason for the employer's actions. Such a requirement would be immense, if not insurmountable. Instead, the burden of production placed on the defendant simply frames the remaining portions of the lawsuit. A "clear and convincing" standard is not needed to accomplish this goal. *Burdine* makes clear that "the employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons." *Id.*, at 256, 101 S.Ct., at 1095 (quoting *Sweeney*, 439 U.S., at 25, n. 2, 99 S.Ct., at 296.). Moreover, *Burdine* rejected the Fifth Circuit's former scheme which "placed on the defendant the burden of persuading the court that it had *convincing, objective reasons* for preferring the chosen applicant above the plaintiff," *id.*, at 257, 101 S.Ct., at 1095 (emphasis added), reasoning:

> We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the

> employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.

Id., at 257, 101 S.Ct., at 1096.

When further defending this policy, the Court noted that "defendant's explanation of its legitimate reasons must be clear and reasonably specific." *Id.*

With the case *sub judice*, it is uncontroverted that respondents' proffered reasons were "clear and reasonably specific." Petitioner was knowledgeable of each reason for his discharge and had full opportunity to challenge these reasons. Instead, and throughout his appeal, it has been argued that these specific reasons were mere pretextual to the underlying charge of discrimination. Such findings are factual in nature, necessarily entailing questions of intent and credibility, and are insulated from appellate review unless they are clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed. 2d 66 (1982). The factual support for respondents' employment decision was of a detailed nature; the District Court went so far as to say: "the reasons proffered by the school board . . . are supported by substantial evidence." Appendix B-19. The Circuit Court of Appeals, after adequate briefing, affirmed. Petitioner has received a full and complete opportunity to present his argument that the proffered reasons were pretextual. He cannot make such a showing.

Petitioner's second avenue implicates the possibility of shifting the burden of persuasion to the employer once a plaintiff has established a prima facie case. Again, *Bur-*

dine directs otherwise. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S., at 253, 101 S.Ct., at 1093; *id.,* at 256, 101 S.Ct., at 1095; see also, *Sweeney,* 439 U.S., at 25, n. 2, 99 S.Ct., at 296; *Ford Motor Co. v. E.E.O.C.,* 458 U.S. 219, 224, n. 7, 102 S.Ct. 3057, 3061, 73 L.Ed. 2d 721 (1982) ("As *Burdine* commands, the District Court did not place the burden of persuasion on [the employer]."). The reasons petitioner might offer to support this argument have already been considered by this Court on at least two recent occasions. Petitioner fears that absent a more stringent burden an employer "may compose fictitious, but legitimate, reasons for his actions." See *Turner v. Texas Instruments, Inc.,* 555 F.2d 1251, 1255 (5th Cir. 1977). Petitioner states: "[t]he problem of showing discrimination in a case such as this . . . is far more difficult than in the usual case of comparing a worker [sic] treatment with a non-minority worker who is employed at the same time under the same conditions. . . . [and] ought to raise a far stronger presumption of unlawful discrimination than the usual case, simply because of the extreme difficulty of a plaintiff with a meritorious case being able to prove his case on the merits." Petition, pp. 27-28. When the *Burdine* Court rejected arguments to increase the employer's obligation beyond that of a burden of production, it stated:

> We do not believe . . . that limiting the defendant's evidentiary obligation to a burden of production will unduly hinder the plaintiff. First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific. . . . Second, although the defendant does not bear a formal burden of per-

> suasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Third, the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. . . . Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.

Burdine, 450 U.S., at 258, 101 S.Ct., at 1096 (citations omitted).

More recently, the Court addressed petitioner's complaints concerning the difficulty of proving intentional discrimination in the case of *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed. 2d 403 (1983). There the Court noted:

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "basic allocation of burdens and order of presentation of proof," *Burdine*, 450 U.S., at 252, 101 S.Ct., at 1093, in deciding the ultimate question. The law often obliges finders of fact to inquire into a person's state of mind.

Aikens, 460 U.S., at 716, 103 S.Ct., at 1482.

Since the Court has recently rejected arguments consistent with those of the petitioner, certiorari should be denied on this basis.

CONCLUSION

Petitioner has presented no compelling reason why certiorari should be granted and failed to raise the issue at either the trial or the circuit level. Petitioner's current argument is adequately managed through the flexible *McDonnell Douglas* framework. "The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corporation v. Waters,* 438 U.S., at 577-578, 98 S.Ct., at 2949-2950. The central focus of the inquiry in a case such as this is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex or national origin. *Teamsters v. United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 1854, 52 L.Ed.2d 396 (1977).

The proper approach to addressing petitioner's argument, as outlined by this Court's decisions, is to construe the alleged changes in the required work performance as giving rise to an inference of discrimination. The fact that a non-minority may have been retained in past years goes to the persuasive weight given the inference by the trier of fact. The burden placed upon the defendant should not change from a burden of production; and a plaintiff should be required to carry the ultimate burden of per-

suasion. This is the methodology adopted by both the District Court and the Court of Appeals. Respondent's rebuttal testimony, described by the District Court as "substantial," obviously outweighed petitioner's evidence at trial. Such a finding is factual in nature and should not be disturbed. As the Court of Appeals stated: "Although the comparison between treatment accorded Work [the non-minority counter-part] and that accorded [petitioner] might support an inference of discrimination, it is insufficient to undermine the thorough findings of fact marshalled to support the district court's decision." Appendix C-9.

Accordingly, respondents respectfully request that petitioner's writ of certiorari be denied.

Respectfully submitted,

OXFORD MUNICIPAL SCHOOL DISTRICT and its Board of Trustees in their individual and official capacities, GENE MEADOWS and TERRY MOOD, in their individual and official capacity.

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APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-4600

SAMUEL P. TORRENCE, JR.
PLAINTIFF-APPELLANT

versus

OXFORD MUNICIPAL SCHOOL DISTRICT and its BOARD OF TRUSTEES, in their individual and official capacities, GENE MEADOWS and TERRY MOOD, in their individual and official capacity

DEFENDANTS-APPELLEES

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

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* * *

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ISSUES

1. Whether the District Court erred in finding that the appellant, Samuel P. Torrence, Jr., was discharged from his employment with the Oxford Municipal School District because of his race. This issue encompasses three sub-issues:

a. Whether the school administration deliberately engaged in a long-term plan to put Mr. Torrence into a position where he could not possibly measure up to the standard required of him by the administration;

b. Whether Mr. Torrence was treated differently from other band directors and employees who achieved similar results, but were allowed to retain their employment;

c. Whether the school dministration adequately supported Mr. Torrence after it voted to retain him based upon the recommendations of a hearing officer in 1980 which recommendations included such items as an assistant band director, new uniforms, etc.

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ARGUMENT

THE FIRING OF THE APPELLANT, SAMUEL TORRENCE, WAS RACIALLY MOTIVATED AND FALLS WITHIN THE PROHIBITION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The case law involving Title VII Discrimination suits is well established. Under *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) the United States Supreme Court held that under the statute the complainant must carry the initial burden of establishing a prima facie case of racial discrimination. The burden then shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. 411 U.S. at 802. Should the defendant carry this burden, then the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not the true reasons, but were a pretext for discrimination. Ibid at 411 U.S. 804.

The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times, however, with the plaintiff. The *McDonnel Douglas* division of intermediate evidentiary burdens serves to bring the . . .

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